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U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Civil Action No. 09-2365

In Regard to the Matter of:

Bayside State Prison
Litigation

OPINION/REPORT
OF THE
SPECIAL MASTER

ALVIN THORNTON

-vs-

WILLIAM H. FAUVER, et al.,
Defendants.

* * * *

THURSDAY, JUNE 4, 2009

* * * *

BEFORE THE HONORABLE JOHN W. BISSELL, SPECIAL MASTER

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4 Transcript of proceedings in the above
5 matter taken by Theresa O. Mastroianni, Certified
6 Court Reporter, license number 30X100085700, and
7 Notary Public of the State of New Jersey at the
8 United States District Court House, One Gerry Plaza,
9 Camden, New Jersey, 08102, commencing at 12:08 PM.

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25

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2 A P P E A R A N C E S:

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1 JUDGE BISSELL: I'm now reopening
2 proceedings in the matter of Alvin Thornton, civil
3 action 09-2365.

13 As finalized after review under Local
14 Civil Rule 52.1 this transcript will constitute the
15 written report required under paragraph seven of the
16 Order of Reference to a Special Master.

17 Mr. Thornton arrived at Bayside State
18 Prison in December of 1996 and remained at that
19 facility until February of 1999. After an assignment
20 to the tents for classification, he eventually was
21 assigned to F Unit, cell number 246 as he testified
22 here before us on June 2.

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1 Officer Baker stagger first within the unit and then
2 out into the courtyard.

3 He was among the inmates extracted from
4 the unit on that very day, July 30th, 1997, and among
5 those who were taken to Internal Affairs to be
6 interviewed about the matter. He does not allege any
7 assault upon extraction from his cell.

8 As I mentioned, he does not assert that
9 he was assaulted in any way upon the extraction or
10 upon the early parts of his journey to the office of
11 Internal Affairs. However, he does describe certain
12 events as occurring to him while being placed up
13 against a wall in a segment of the administrative
14 area of the prison while awaiting being called in to
15 speak to those in Internal Affairs.

16 His testimony appears first at pages 31
17 through 34 which I'll read in various segments
18 beginning at line 13 on page 31.

19 "Question: Did there come a time when
20 you were actually assaulted?

21 "Answer: Yes.

22 "Question: When was that?

23 "Answer: As I proceeded through the
24 gauntlet to the east arcade, as I got to the gate to
25 go through into the east arcade area, an officer was

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1 on the right and an officer was on the left, both of
2 them proceeded to grab me by my arms, walk me past
3 the gym to go to the right to where the officers are
4 in the east arcade."

5 A map was employed to try to show his
6 journey.

7 Continuing at page 32, line 20.

8 "Answer: I was along this wall before
9 you go into the yard. To where they had me stand
10 with my face to the wall. The officer, there was
11 still an officer on my left, officer on my right.
12 Officer on my left unhandcuffed my left hand, told me
13 to place it above my head on the wall. I placed my
14 hand on the wall to which he grabbed my hand with his
15 right hand and hit my hand with the stick with his
16 left hand.

17 "Question: Can you describe what you
18 mean by a stick?

19 "Answer: The stick that they was
20 carrying.

21 "Question: Big, long, black? What
22 color was it?

23 "Answer: They were black.

24 "Question: Now, were these the same
25 two officers who had escorted you from your cell?

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1 "Answer: No.

12 "Question: Now, other than this strike
13 to your hand, were you assaulted at any other time?

14 "Answer: No.

15 "Question: So this is the assault
16 we're talking about across your hand?

17 "Answer: Correct.

18 "Question: And it was which hand?

19 "Answer: The left.

22 "Answer: Yes.

25 "Answer: No.

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1 "Question: At any time did you ever
2 disobey any command given to you by those SOG
3 officers?

4 "Answer: No."

5 I might note on cross-examination he
6 indicated that actually four fingers other than his
7 thumb had been the fingers that were hit. I don't
8 find this to be, by any means, a fatal inconsistency.
9 In fact, no inconsistency at all. It's not unusual
10 for people to refer to those four digits as fingers
11 as opposed to the thumb. Furthermore, with the hand
12 spread out on the wall, it's entirely likely and
13 physically possible to have been batted across the
14 four fingers other than the thumb with the thumb
15 being out of range.

16 There was also some cross-examination
17 with regard to prior testimony, I believe, in the
18 depositions that hadn't mentioned the fact that his
19 hand had been held against the wall by the officer.
20 I find that at most this was an omission in the
21 description of the event in the first instance. And
22 secondly, once again, is not so fatally different as
23 to cast any doubt upon the credibility of the
24 testimony presented here in court.

25 In short, there was no evidence

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1 presented effectively to rebut or cast doubt upon the
2 credibility of the testimony of this witness.

3 In a motion at the conclusion of the
4 evidence I was asked to assess the questions of
5 whether we were dealing here with deminimis force
6 and/or deminimis injury. At that time I stated I was
7 not prepared to rule essentially as a matter of law
8 on such a motion, that the only force applied here
9 was deminimis. And I persist in that determination.

10 Brooks v. Kyler, 204 F.3rd 102 (3rd Cir. 2000)
11 recites some five factors that can be considered.
12 I'm not certain that they're exclusive, but they
13 certainly cover the waterfront in determining whether
14 the use of force in this case can be characterized as
15 deminimis. And here I do find that the officer on
16 Mr. Thornton's left at the time he was being held in
17 position before going in to speak with Internal
18 Affairs did, in fact, strike him with force to the
19 extent that it inflicted an injury upon him. The
20 pain was acute at first and later with swelling for a
21 couple of days and eventually a deformed left pinky,
22 although no lasting pain. I'll have a little more to
23 say about that when I get around to the question of
24 deminimis injury.

25 Furthermore, on this factual review,

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1 D-708 introduced in evidence by the defense which
2 consisted of Mr. Thornton's answers to
3 interrogatories, in answer number four, was entirely
4 consistent with his testimony here in court at which
5 point he states: "When I arrived at the east arcade,
6 I had to wait outside with my face placed nose first
7 against the wall. While I was waiting to go in and
8 be questioned by IA, one of the SOGs approached me
9 from behind and told me to place my left hand over my
10 head and place it against the wall. After saying
11 this, he hit my left hand with the night stick and
12 told me that I better tell everything that I know."

13 That in my view establishes or
14 reestablishes the fact of the striking, but also
15 indicates a reason. Namely, that this officer in the
16 wake of the death of a fellow corrections officer,
17 albeit not one with whom the SOG officer worked on a
18 regular basis, serving his own agenda in this case
19 basically said, you tell everything to Internal
20 Affairs.

21 Now, let's take a look at the Brooks
22 factors to see where they fall here. One, was there
23 a need for the application of force? Absolutely not.
24 This plaintiff had been completely compliant with all
25 instructions up to that point, had not needed to be

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1 handled or encouraged even to do the things that were
2 being asked of him and was in a completely vulnerable
3 and benign position with one hand still handcuffed
4 and the other one up against a wall which he was
5 facing with no opportunity to become a danger either
6 to the area or the officers around him.

7 Second, the relationship between the
8 need and the amount of force that was used. Well,
9 the need here was zero and the force that was used
10 was considerably more than might have been needed
11 even to prompt the inmate into compliance.

12 Three, the extent of injury inflicted.
13 It was not extensive. But that will be addressed in
14 my observations on deminimis injury and/or the extent
15 of damages proven here.

16 Four, the extent of the threat to the
17 safety of staff and inmates as reasonably perceived
18 by the responsible officials on the basis of the
19 facts known to them. In this particular setting at
20 this particular time with the presence of officers
21 having this inmate completely under control, there
22 was absolutely no threat whatsoever to them or to the
23 surrounding area and the persons within it.

24 Five, any efforts made to temper the
25 severity of a forceful response. Once again, there

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1 was no effort at all to temper this aggressive,
2 unnecessary whack on the back of his hand. And as
3 the Hudson case in the Supreme Court describes it a
4 bit more succinctly: "The Eighth Amendment's
5 prohibition of cruel and unusual punishments
6 necessarily excludes from constitutional recognition
7 deminimis uses of physical force provided that the
8 use of force is not of a sort repugnant to the
9 conscience of mankind."

10 I find frankly that this assault by the
11 SOG officer on this occasion under these
12 circumstances is indeed repugnant to the conscience
13 of mankind. Completely unnecessary, serving his own
14 agenda in terms of what he wanted this person to say
15 as a witness and indeed sadistic with the specific
16 design and intent to inflict punishment through the
17 use of entirely excessive force.

18 I do reiterate, however, at this time,
19 I don't think it's necessary to elaborate on the
20 standards involving deminimis injury, but I do find
21 that indeed the injury here was deminimis. Now, the
22 significance of deminimis injury, however, as a
23 matter of law, and I also addressed this on June 2 at
24 page 107 of the transcript, is that it will not
25 support a claim for emotional or psychological

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1 injury. In other words, there has to be a physical
2 injury component under the PLRA in order to support
3 such an award, but even if there is slight injury or
4 deminimis injury, that is not sufficient under
5 emerging case law to satisfy the PLRA's requirement.
6 I think that is an adequate presentation for purposes
7 of this opinion. I will, however, reiterate the
8 philosophy behind that. And once again we're
9 construing the PLRA as it appears at 42 USC.
10 Section 1997 e(e).

11 I'm quoting from the case of *Mitchell*
12 *v. Horn*, 318F.3rd 523 in the Third Circuit. The
13 analysis is as follows: "We believe that reading
14 1997 e(e), to allow a plaintiff to allege any
15 physical injury no matter how minor would produce an
16 unintended and, indeed, absurd result. Were we not
17 to read 1997 e(e) as requiring more than a deminimis
18 injury, we would turn its physical injury
19 prerequisite into a mere pleading requirement,
20 thereby rendering the requirement meaningless as a
21 practical matter. We, therefore, follow the approach
22 of the 5th, 9th and 11th Circuits in requiring a less
23 than significant but more than deminimis physical
24 injury as a predicate to allegations of emotional
25 injury."

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Finally, although not every item of evidence has been discussed in this opinion/report,

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1 all evidence presented to the Special Master was
2 reviewed and considered. I find that the injury
3 inflicted here is actionable. I find that the injury
4 was acute initially and remained permanent, although
5 without continuing pain or any significant
6 restriction on Mr. Thornton's activities. He does,
7 indeed, have a slightly deformed left pinky, but that
8 does not cause him any continuing physical distress,
9 nor did it for any measurable length of time after it
10 was incurred.

11 However, I do recommend in this report
12 that the district court enter an award of
13 compensatory damages in the amount of \$2,000 in Mr.
14 Thornton's favor.

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1 C E R T I F I C A T E

2

3 I, Theresa O. Mastroianni, a Notary Public and

4 Certified Shorthand Reporter of the State of New

5 Jersey, do hereby certify that the foregoing is a

6 true and accurate transcript of the testimony as

7 taken stenographically by and before me at the time,

8 place, and on the date hereinbefore set forth.

9 I DO FURTHER CERTIFY that I am neither a

10 relative nor employee nor attorney nor counsel of any

11 of the parties to this action, and that I am neither

12 a relative nor employee of such attorney or counsel,

13 and that I am not financially interested in the

14 action.

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19 
Theresa O. Mastroianni, C.S.R.
20 Notary Public, State of New Jersey
My Commission Expires May 5, 2010
21 Certificate No. X10857
Date: June 4, 2009

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